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In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1948

No. 471

WILSON BROS. & Co.,
(a corporation),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

May it please the Court:

The undersigned on behalf of Wilson Bros. & Co., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case, numbered therein No. 11,980.

OPINIONS BELOW.

The opinion of the Tax Court is reported 10 T.C. 251.

The opinion of the Court of Appeals (R. 58) is not yet reported.

JURISDICTION.

The judgment sought to be reviewed was entered on November 2, 1948 (R. 57). The jurisdiction of this Court comes from Title 28, United States Code, §§ 1254(1) and 2101(c), read with Internal Revenue Code § 1141(a).

The jurisdiction of the Court of Appeals came from Internal Revenue Code, §§ 1141 and 1142. Pursuant to § 1141(b)(2) there is a venue stipulation at R. 51. The decision of the Tax Court was entered May 18, 1948. (R. 48.) The petition for review was filed with the Clerk of the Tax Court on June 30, 1948, (R. 50.)

The jurisdiction of the Tax Court came from Internal Revenue Code, § 272. The notice of deficiency (I.R.C. § 272(a)(1)) is dated May 29, 1946. (R. 9.) The petition to the Tax Court for a redetermination was docketed by it on August 20, 1946. (R. 2.)

QUESTION PRESENTED.

Two Pacific coast lumber schooners held by a corporation were laid up (under watchman and maintenance expense, and depreciation) by it in 1929 because of bad lumber market conditions. Thereafter, it closed down its lumber yards and in consequence its income became per-

sonal holding company income ("Subchapter A net income"). Neither boat ever was a pleasure yacht. The question is:

Did the court below err in ruling that the boat expenses and depreciation were within the field of application of the loophole-plugging section of the anti-evasion Act of 1937 that became section 406(b) of the Revenue Act of 1938, and in turn section 505(b) of the Internal Revenue Code?

STATUTORY PROVISIONS.

As will appear infra this case presents an integration of section 505(b) with the expense and depreciation provisions of section 23 of the Internal Revenue Code, and corresponding portions of earlier Acts.

I.

INTERNAL REVENUE CODE § 505(b).

(a) The statute.

§ 505. Subchapter A Net Income.

For the purposes of this subchapter the term "Subchapter A Net Income" means the net income with the following adjustments:

(a) Additional deductions. • • •

(b) Deductions not allowed. The aggregate of the deductions allowed under Section 23(a), relating to expenses, and Section 23(l), relating to depreciation, which are allocable to the operation and maintenance of prop-

erty owned or operated by the corporation, shall be allowed only in an amount equal to the rent or other compensation received for the use of, or the right to use, the property, unless it is established (under regulations prescribed by the Commissioner with the approval of the Secretary) to the satisfaction of the Commissioner:

(1) That the rent or other compensation received was the highest obtainable, or, if none was received, that none was obtainable;

(2) That the property was held in the course of a business carried on bona fide for profit; and

(3) Either that there was reasonable expectation that the operation of the property would result in a profit, or that the property was necessary to the conduct of the business.

(b) Legislative history.

We print it as Appendix A. (And see Paul, *The Background of the Revenue Act of 1937*, 5 Univ. of Chicago Law Rev. 41 (1937).)

The clear intention of the Congress was simply to plug the loophole in the taxing statute (Revenue Act of 1936), whereunder deductions were denied individuals for "personal, living, or family expenses", but which in practice was being evaded by incorporating yachts in conjunction with income-bearing securities, under the evasion theory that the business of a corporation comprehends all its activities empowered under its charter.

II.

INTERNAL REVENUE CODE § 23.

(a) The statute.

All of the revenue acts, from the beginning in 1913, i.e., including the Acts of 1936, 1937, 1938 and the Code, were retroactively amended by Section 121 of the Act of 1942 as follows:

"Sec. 121. NON-TRADE OR NON-BUSINESS DEDUCTIONS.

(a) DEDUCTIONS FOR EXPENSES.—Section 23(a) (relating to deduction for expenses) is amended to read as follows:

'(a) EXPENSES.—

'(1) TRADE OR BUSINESS EXPENSES.— • • •

'(2) NON-TRADE OR NON-BUSINESS EXPENSES.—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservative or maintenance of property held for the production of income.' • • •

(b) • • •

(c) DEPRECIATION DEDUCTION.—The first sentence of section 23(l) (relating to deduction for depreciation) is amended to read as follows: 'a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

'(1) of property used in the trade or business, or

'(2) of property held for the production of income.'

(d) TAXABLE YEARS TO WHICH AMENDMENTS APPLICABLE.—The amendments made by this section

shall be applicable to taxable years beginning after December 31, 1938.

(e) **Retroactive** AMENDMENTS TO PRIOR REVENUE ACTS.—For the purposes of the Revenue Act of 1938 or any prior revenue Act the amendments made to the Internal Revenue Code by this section shall be effective **as if they were a part of such Revenue Act on the date of its enactment.**"

(b) Legislative history.

We print it as Appendix B.

The Act of 1942 introduced retroactively and prospectively the new deduction concept, "Non-trade or non-business deductions" for expenses and for depreciation, in the case of an individual.

STATEMENT.

The court below affirmed a redetermination of personal holding company surtax deficiencies by the Tax Court as follows:

Year	Deficiency	25% Penalty
1938	None	None
1939	$ 8,517.78	$2,129.45
1940	13,740.74	3,435.19
1941	9,899.35	None
1942	7,079.22	1,769.80

The question relates to the application or non-application of a statute to the facts found by the Tax Court, and is therefore outside the Dobson rule: *McWilliams v. Commissioner of Internal Revenue*, 331 U.S. 694, 703, last paragraph. We set out the facts as found by the Tax

Court (R. 33; 10 T.C. 251. The asterisks denote deleted matter relating to other issues not here presented):

1. **Facts as found by the Tax Court.**

The corporation was organized in December, 1928 by [W. T. Wilson] and his brother, F. A. Wilson. * * * The brothers were successfully engaged as partners in the milling, shipping and selling of lumber on the west coast of the United States. They operated logging camps and sawmills, manufacturing lumber in Washington and shipping it on the two schooners, the *Oregon* and the *Idaho,* for sale in San Francisco, Los Angeles and San Diego. The business was begun by their grandfather, continued by their father, and they participated in it from early youth. After 1928 it was conducted by the corporation. The schooner *Oregon,* in which the brothers owned a 100 per cent interest, and the schooner *Idaho,* in which they owned a 75 per cent interest, were transferred to the corporation at a value of $175,000. * * * F. A. Wilson had charge of maintaining and repairing the two schooners which were not in use. * * * He and [W. T. Wilson] were both active in seeking a purchaser or lessor for the schooners, and in 1939 he made an unsuccessful trip to the northwestern states in search of lumber. * * * In 1938 the corporation ceased to deal in lumber, and its only business was the care of investments and the collection of dividends and a small amount of rent. * * * The two schooners, transferred to the corporation, are wooden-hulled boats of 1,800 tons, dead weight, with cargo space for 1,200,000 board feet of lumber. After being operated by the corporation for a part of the year 1929, they were "laid up" because a

lull in the lumber market left [W. T. Wilson] with large unsold stocks on hand. For some years thereafter [W. T. Wilson] and his brother expected to put the boats back into service, shipping lumber in them again when market conditions should improve. But in succeeding years such conditions grew worse, and the boats have never been used. They have been kept moored, however, under the care of a watchman who cleans and paints the superstructure, and at intervals of 15 to 18 months they are placed in drydock for general overhauling, caulking and repairs. While not seaworthy since 1929, they have been maintained in such a condition that they could be made so within a period of 60 to 90 days. In 1938 [W. T. Wilson] took over individually a retail branch of the corporation's business, selling pine to motion picture studios and others from the office and lumber yard which the corporation formerly used. Since that year the corporation has not dealt in lumber or derived any income from its sale. During the years 1938-1942 numerous efforts were made to sell or lease the boats, some offers were received but not accepted. Being of wood the schooners are inferior to ships having steel hulls and can not be as readily leased or sold. During the war they were not desired by the Maritime Commission because slow and small. For the years 1938-1942 the following amounts were claimed and **allowed for income tax purposes** as depreciation and expenses connected with them:

Year	Total	Depreciation	Expenses
1938	$12,459.96	$10,002.08	$2.457.88
1939	15,094.35	10,002.08	5,092.27
1940	15,028.68	10,002.08	5,026.60
1941	16,166.87	10,002.08	6,164.79
1942	12,898.05	10,002.08	2,895.97

These amounts were not allowed as deductions in the determination of the corporation's personal holding company surtax. The corporation received no rent or other compensation for the use of the boats in 1938, 1939, 1940, 1941 and 1942; the boats were not held in the course of the corporation's business in those years and were not necessary to the conduct of that business.

SPECIFICATION OF ERROR TO BE URGED.

The court below erred in ruling that the boat expenses and depreciation were within the field of application of section 505(b) of the Internal Revenue Code and predecessor section 406(b) of the Revenue Act of 1938. (For underlying Statement of Points see R. 50-51).

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below conflicts in principle with *Brown v. Duchesne,* 19 How. (60 U.S.) 183, and the line of cases led by *Church of the Holy Trinity v. U. S.,* 143 U.S. 457, including the income taxation cases of *Haggar Co. v. Helvering,* 308 U.S. 389, *Helvering v. New York Trust Co.,* 292 U.S. 455, *McWilliams v. Commissioner,* 331 U.S. 694, and *Gregory v. Helvering,* 293 U.S. 465. The principle of those cases is that the words of a statute are not to be applied to cases outside the *field of application* intended by the Congress. The decision of the court below confuses meaning with application, and misapplies a literal meaning outside the intended field of application.

2. The decision of the court below conflicts with the decision in the Sixth Circuit in *Musselman Hub-Brake Co. v. Commissioner,* 139 F. 2d 65. There, it was decided that the anti-evasion and anti-avoidance Act of 1937 is not to be construed and applied as an independent statute, but as a *dependent* one, by integration with the basic taxing statute, i.e., by "confining" the scope of the Act of 1937 "to the object of its creation". And that principle of dependency is the principle of *Helvering v. Morgan's, Inc.,* 293 U.S. 121 (income taxation), *Ozawa v. U.S.,* 260 U.S. 178, and *U.S. v. Hutcheson,* 312 U.S. 219.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
December 15, 1948.

GEORGE M. NAUS,
Attorney for Petitioner.

(Appendices A and B are appended after the following Brief in Support).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SPECIFICATION OF ERROR TO BE URGED.

The court below erred in ruling that the boat expenses and depreciation were within the field of application of section 505(b) of the Internal Revenue Code and predecessor section 406(b) of the Revenue Act of 1938.

SUMMARY OF THE ARGUMENT.

The setting of section 505(b) of the Internal Revenue Code and predecessor section 406(b) of the Revenue Act of 1938 comes from the dependent, loophole-plugging Act of 1937. The "hole" was that a corporation has no "personal, living, or family expenses". The "plug", in the case of incorporated yachts, was to disallow deductions for boat expense and depreciation to the extent of excess over the amount received by the corporation for "rent or other compensation" from the yacht, together with some subsidiary provisions. The legislative history of the Act of 1937 is exceptionally clear about it. The purpose, the field of application, is simply the disallowance to a closely-owned corporation of boat expenses and depreciation not allowable if the boat were owned by an individual.

The Act of 1937 was not a taxing act. The then current taxing act was the Revenue Act of 1936. The separate provisions of each were carried into the Revenue Act of 1938, and in turn into the Internal Revenue Code (1939). Section 505(b) of the Internal Revenue Code is a dependent provision, and must be integrated with the expense and depreciation provisions of section 23 of the Code. The

inquiry becomes: If the boats were held by an individual, would the expense and depreciation be deductible? If so, section 505(b) has no application; if not deductible by an individual, then section 505(b) applies.

Through section 121 of the Revenue Act of 1942, the deductibility of "non-trade or non-business" expenses and depreciation "in the case of an individual" was enacted by amendment of section 23 of the Code, retroactively through all earlier Acts, "as if they were a part of such Revenue Act on the date of its enactment". Act of 1942, § 121(e). And see (d). The boat expenses and depreciation therefore would have been deductible in the case of an individual in all years at bar, whether the boats were "used in a trade or business" or not, because they were "held for the production of income" within the meaning of that new phrase in the Revenue Act of 1942.

In the course of the opinion of the court below, at R. 61, it cited *O'Sullivan Rubber Co. v. Commissioner,* 120 F. 2d 845. That case is not in point. It arose under the independent *taxing* Revenue Act of 1934, which in section 351 was the genesis of surtax penalties laid on the income of personal holding companies. All corporate accumulations were reached by the Act of 1934, and sections 102 and 351 simply divided corporations into two mutually exclusive classes for reaching accumulations. The classifications were clear, and motive for classifying was immaterial. The cited case decides only that a corporation had no ground to complain that it fell in one class while the evil could have been met by putting it in the other.

ARGUMENT.

The learned court below misrelied (R. 61) on the case of *O'Sullivan Rubber Co. v. Commissioner*, 2 Cir., 120 F. 2d 845. That case was correctly decided, but is not in point. There, the amount of undistributed net income for the tax year 1935 was not disputed, and the corporation fell within the statutory definition of a "personal holding company" under Act 1934, § 351(b)(1). That was the Act and section that originated the levy of a surtax on "undistributed" income of a "personal holding company". It compelled distribution of at least 80 per cent of income, thereby through a fixed percentage eliminating the difficulties under § 102 of reaching undistributed income of corporations generally when accumulated without distribution. §§ 102 and 351 simply divided corporations into two mutually exclusive classes with respect to the Commissioner's taxing reach of accumulations. The respective *fields of application* of the two sections were within clear legislative intent. In result, each section was a **taxing** statute, an *independent* one.

Three years later in 1937 came the Act of that year—not an independent taxing statute, but a dependent statute aimed generally against evasion loopholes in the taxing statute, which had become the Act of 1936. It was not aimed at personal holding companies alone, but at evasion generally. The act of 1937 was a *dependent* statute.

(a) The purpose and intent of the Congress in enacting § 505(b).

It is perfectly clear that the purpose of the Congress was and is simply to deny to a "personal holding company" as a corporation any deduction not permitted if a

yacht or boat were held by an individual. That is the whole of the **field of application** of the statute, the test of application.

It is difficult to imagine a case in which materials for ascertaining the purpose and intent in enactment of a statute could be clearer than in the enactment of the Act of 1937. It is fully and clearly spelled out in the "Legislative History" set out in Appendix A.

The literal words of a statute must be literally applied, but the purpose and intent of the legislature must, if clearly known, furnish the guide to the **field of application** of the statutory words.

In *Brown v. Duchesne*, 19 How. (60 U.S.) 183, the suit was for damages for alleged infringement of a patent issued pursuant to the act of Congress for a new and useful improvement in constructing the gaff of sailing vessels, and was brought by the patentee against the alien owner of a foreign flag vessel which was temporarily within the port of Boston. It was clear that the infringement suit was literally within the words of the Act, but it failed because wholly outside the *field of application* intended by the Congress. The Court said that although the case fell within the letter of the statute, "the Court is of opinion that cases of that kind were not in the contemplation of Congress in enacting the patent laws, and cannot, upon any sound construction, be regarded as embraced in them. * * * We think these laws ought to be construed in the spirit in which they were made—that is, as founded in justice—and should not be strained by technical constructions to reach cases which Congress evi-

dently could not have contemplated, without departing from the principle upon which they were legislating, and going far beyond the object they intended to accomplish". (15 L. Ed. at 600, col. 1.)

The words of the statute on which the indictment in *U. S. v. Kirby*, 7 Wall. (74 U.S.) 482, was laid were, "if *any* person shall knowingly and willfully obstruct or retard the passage of the mail", and therefore literally reached the act of the sheriff Kirby in executing a state warrant of arrest on the mail carrier Farris. But, clearly, the sheriff's act was outside the intended field of application of the act of Congress, and therefore his defensive plea was held good. The Court said (19 L. Ed. at 280, col. 2):

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter."

The leading case of *Church of the Holy Trinity v. U. S.*, 143 U.S. 457, was a suit by the United States to recover a statutory penalty* of $1,000.00 under an act which imposed it upon anyone who "in any manner whatsoever" assisted the importation or migration of any alien or foreigner in to the United States. The defendant brought an alien into the United States from England to serve it

*The personal holding company surtax is a penalty surtax. *Knight Newspapers v. Commissioner*, 6 Cir., 143 F. (2d) 1007.

as rector and pastor. The Court said that "it must be conceded that the act of the corporation is within the letter" of the statute (page 458), but further said (page 460):

> "The court must restrain the words. **The object designed to be reached by the Act must limit and control the literal import of the terms and phrases employed.**"

At page 463 the Court said:

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court property looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislatime body. *United States v. Union Pac. R. Co.*, 91 U.S. 72, 79.99."

It was thereupon held that the particular case before the Court, although literally within the statute, was not within the object or evil sought to be remedied, and therefore the defendant was not subject to the statutory penalty. In conclusion (page 472), the Court ruled that the facts were not within the *field of application* of the statute, and therefore not "within the statute", saying:

> "It is a case where there was presented a definite evil, in view of which the Legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have ben intentionally legislated against. It is the duty of the courts, under those circumstances, to say that how-

ever broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute.''

After the alien Lau Ow Ben had been domiciled in Portland, Oregon, as a merchant for seventeen years, he went to China for a temporary visit with the intention of promptly returning to the United States. Upon reaching the port of San Francisco on his return he did not produce the statutory certificate required under the exclusion acts of 1882 and 1884, the words of which if literally applied would exclude him from entry. It was ruled that this case, *Lau Ow Ben v. U. S.*, 144 U.S. 47, was not within the field of application, the Court saying (36 L. Ed. at 345, col. 2):

> ''The general terms used should be limited to those persons to whom Congress manifestly intended to apply them, and they would evidently be those who are about to come to the United States for the first time, and, therefore, might properly be required to apply to their own government for permission to do so, as also to so identify them as to distinguish them as belonging to the classes who could properly avail themselves of such leave.''

He was accordingly permitted to enter without the statutory certificate.

Pickett v. U. S., 216 U.S. 456, was a capital case. Appellate review of Silas Pickett's conviction of murder, in a federal District Court created upon the admission of Oklahoma as a state, turned on the statutory words ''when admitted''. A literal application of the words would have

saved Silas Pickett's life, but he lost it because the Court ruled (216 U.S. at 461): "The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage."

The words of section 41 of the Criminal Code (18 USC § 93), "No officer or agent of any corporation * * * shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation", literally embraced Alien Property Custodian Garvan as president of the corporation Chemical Foundation. However, in *U. S. v. Chemical Foundation*, 272 U.S. 1, the Court declined to apply the words to him. It said that the statute was a penal one and was not to be "extended" to cases "exceptional to its spirit and purpose" (272 U.S. at 18), and that, "The transactions complained of did not involve any of the evils aimed at by § 41" (272 U.S. at 19).

The plain literal words of the Constitution, art. 3, §2 are: "The judicial power shall extend * * * to all cases affecting * * * consuls"; and of the Judicial Code, § 256, 28 USC § 271: "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states, * * * Eighth. Of all suits and proceedings * * * against consuls or vice consuls". Judicial Code, § 24, 28 USC § 41(18), conferred original jurisdiction on the District Courts, "Of all suits against consuls and vice consuls." "All" is the acme of inclusion. The words "all cases" plainly and clearly embrace a suit against a vice consul for divorce and alimony, yet the Court refused

to apply the words to such a case in *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379. It said (280 U.S. at 383):

> "The language, so far as it affects the present case, is pretty sweeping, but, like all language, it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used."

The acquittal of Sorrells in the entrapment case of *Sorrells v. U. S.*, 287 U.S. 435, notwithstanding his guilt if the words of the penal statute were literally applied, was grounded upon the ruling against the prosecutor's contention that rested "entirely upon the letter of the statute" and took "no account of the fact that its *application* in the circumstances under consideration is foreign to its purpose" (287 U.S. at 446), and the Court condemned a "literal interpretation of statutes at the expense of the reason of the law" (page 446), citing fourteen of its earlier decisions. (287 U.S. at 446-448.)

In *Pinella's Ice & Cold Storage Co. v. Commissioner*, 287 U.S. 462, the taxed transaction was literally within the non-recognition words ("substantially all the properties of another corporation"), but the gain was recognized and taxed because the transaction was "beyond the evident purpose of the provision". (287 U.S. at 470.)

In *Helvering v. Gregory*, 2 Cir., 69 F. (2d) 809 (affirmed, *Gregory v. Helvering*, 293 U.S. 465), the taxed transaction was literally within the non-recognition words of the statute but the gain was recognized and taxed because the transaction was outside "the underlying presupposition" (69 F. (2d) at 811, col. 1) gleaned from

legislative committee reports. Judge Hand's "underlying presupposition" became in this Court "the thing which the statute intended". (293 U.S. at 469.)

The question in *Haggar Co. v. Helvering,* 308 U.S. 389, related to "declared value" in a capital stock tax return, with respect to the value "as declared by the corportion in its first return", and was whether, when the first return was amended, the amended return remained the first or became the second return. Holding that it remained the first, the Court said (308 U.S. at 394):

> "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."

The respective fields of application are mutually exclusive under the sections of the Motor Carrier Act, 1935, and the Fair Labor Standards Act, 1938, considered in *U. S. v. American Trucking Associations,* 310 U.S. 534, wherein the words "maximum hours of service of employees" used in the Motor Carrier Act were plain and literally applicable to all employees. However, the dominant purpose was safe operation, and it was ruled that the purpose controlled the letter; and therefore the words were to be applied only to employees whose activities affect the safety of operation. The Court pointed out that when the plain meaning of words has led to absurd or futile results it has on occasion "looked beyond the words to the purpose of the act", and added (310 U.S. at 543):

> "Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When and to construction of of the meaning of words, as used in the statute, is **available**, there certainly can be no 'rule or law' which forbids its use, however clear the words may appear on 'superficial examination'."

In marginal note 22 thereto *Boston Sand & Gravel Co. v. U. S.*, 278 U.S. 41, 48, was cited, where it had been said:

> "It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an opinion of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists."

Accord, *Helvering v. New York Trust Co.*, 292 U.S. 455, 463-465, where the Court rejected the Government's argument that "If the language be clear it is conclusive" (292 U.S. at 464), and quoted: "a thing which is within the letter of the statute, is not within the statute, unless it is within the intention of the makers". (292 U.S. at 465.)

In *Cabell v. Markham*, 2 Cir., 148 F. (2d) 737 (affirmed, *Markham v. Cabell*, 326 U.S. 404), literal *application* of the words of a statute was refused because outside the purpose; it was stated (148 F. (2d) at 739) that "Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute". In affirming, the Supreme Court added (326 U.S. at 409): "The policy as well as the

letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes as *Church of the Holy Trinity v. U. S.*, 143 U.S. 457, illustrates".

In *McWilliams v. Commissioner*, 331 U.S. 694, the words of the wash sale exclusion were, "sales or exchanges of property, directly or indirectly * * * between members of a family". A husband sold a number of shares not to his wife but to an unidentified buyer through a stock exchange broker, and in the same way his wife bought an equivalent from an unidentified seller. The Tax Court held (5 T.C. 623) that the sale did not occur directly or indirectly between the husband and wife. The decision was reversed, *Commissioner v. McWilliams*, 6 Cir., 158 F. 2d 637, because outside the purpose of the Congress as clearly disclosed in the Report of the House Ways and Means Committee (quoted, 158 F. 2d at 639). This Court affirmed, and *inter alia* stated that Congress, "with such purpose in mind", could not have intended to allow the particular claim of a loss deduction "unless it wanted to leave a loop-hole almost as large as the one it had set out to close". (331 U.S. at 700.)

(b) If the boats had been held by an individual instead of by a corporation the expense and depreciation would have been allowable deductions.

Prior to 1942 the statutory words of the earlier Acts, from the beginning in 1913, were: (1) as to Expenses, "in carrying on any trade or business"; and (2) as to Depreciation, "wear and tear of property used in the trade or business".

Although the five tax years at bar are 1938-1942, nevertheless § 121 of the Act of 1942 amended deduction Section 23 of the Code and the 1938 Act *retroactively*. By the retroaction Section 23 became, as to both expenses and depreciation, as if *from the beginning* it had read: "(1) of property used in the trade or businses, or (2) of **property held for the production of income.**" The 1942 Act thereby introduced the new concept of "non-trade or non-business" deductions, and coined the new inclusionary phrase "property held for the production of income" in antithesis of "sport, hobby or recreation," which when tacked to the previously established express exclusion of an individual's "personal, living or family expenses" rounds out the antithesis to "property held for the production of income." This is abundantly made clear in the Committee Reports under the 1942 Act, set out in Appendix B. The correct legal conclusion from the facts as found by the Tax Court with respect to the boats is that they were "property held for the production of income." This is true, as stated in the Committee reports, "even though there is no likelihood that the property will be sold at a profit or will otherwise be productive of income." In consequence, the lumber boat expense and depreciation are proper items of deduction by an individual.

(c) Integration of § 23 with § 505.

In 1937 the current *revenue* act was the Act of 1936. The Act of 1937 was not a revenue act but was an act aimed against evasion and avoidance of the revenue Act of 1936. The Act of 1937 was a *dependent*, not an

independent, statute. It is purely a dependent statute "designed to prevent tax avoidance." It is not to be read alone, but must be *integrated* with its basic revenue Act of 1936, to determine what loophole was to be plugged, i.e., the general deduction sections of the basic act.

The true basis of interpreting the 1937 Act was stated under that Act in *Musselman Hub-Brake Co. v. Commissioner,* 6 Cir., 139 F. 2d 65, 67, col. 2, as follows:

> "Taxing statutes must be applied within reasonable limits and construed in the light of their purpose. One designed to prevent tax avoidance may, under some circumstances, be liberally interpreted in favor of the taxpayer by **confining its scope to the object of its creation.**
>
> It is necessary to read Sections 23(a) (1) and 24(c) (1) **together** in order to arrive at the intention of the Congress under the long established rule that the purpose of the enactment is to be deduced from a view of every material part of the statute on the subject. Helvering v. Rebsamen Motors, Inc., 8 Cir., 128 F. 2d 584.
>
> We are not here concerned with the rule that deductions are a matter of legislative grace and therefore the taxpayer must bring a claimed deduction clearly within the terms of the statute, because the statutes we are considering all relate to deductions. When Section 23 is applied, the deductions in question are clearly allowable, but for Section 24(c). So, the rule applies that the two sections should be **integrated** to carry into effect their combined purpose. Anderson v. Pacific Coast S. & S. Co., 225 U. S. 187, 203."

Similarly, when the deduction sections of the 1936 Act and the loophole plugging sections of the 1937 Act were carried forward into the 1938 Act and in turn into the Code. *Helvering v. Morgan's, Inc.* infra; *Ozawa v. U. S.*, infra; *U. S. v. Hutcheson,* infra. We state those cases:

The corporation Morgan's, Inc., on June 1, 1925, affiliated with the corporation Haines Furniture Company, and in its return of income taxes for the full year 1925 made separate income tax returns, one for the fraction of five months before affiliation and the other for the remaining fraction of seven months. In the respective periods of five and seven months in 1925, and during 1926, it suffered net losses but made a net profit in 1927. The literal reading of Act of 1926, § 200(a), was "The term 'taxable' year includes, in the case of a return made for a fractional part of a year," and § 206(b) permitted a carry-forward of a net loss "for any taxable year" and deduction of it through two succeeding taxable years. The Commissioner sought, upon a literal application of the words of § 200(a), to exclude a carry-forward of the fraction of five months through two succeeding "taxable years." In ruling against that contention the Court said, *Helvering v. Morgan's, Inc.,* 293 U.S. 121, at 126:

> "But the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, **however precise its language**, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part."

Takao Ozawa was entitled to have his application for naturalization granted if the words of the naturalization Act of 1906 were literally applied without dependent consideration of the naturalization title of the Revised Statutes, but in *Ozawa v. U. S.*, 260 U.S. 178, he was denied naturalization because the Court ruled that it was *unreasonable* to make such literal application "at variance with the policy of the legislation as a whole," and that to find and give effect to the underlying legislative purpose the Court could "look to the reason of the enactment, and inquire into its antecedent history." (260 U.S. at 194.)

The indictment in *U. S. v. Hutcheson*, 312 U.S. 219, was good under a literal reading and application of the Sherman Act, but was held bad because outside the Congressional purpose under the Norris-LaGuardia Act.

CONCLUSION.

The writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Dated, San Francisco, California,
December 15, 1948.

Respectfully submitted,
GEORGE M. NAUS,
Attorney for Petitioner.

(Appendices A and B Follow.)

Appendices

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A. Legislative history of Section 505(b) i

B. Legislative history of Non-trade or Non-business Deductions ix

Appendix A

Legislative history of section 505 (b).

Section 505(b) of the Code originated in the first section of Revenue Act of 1937, which recast § 351, "Surtax on Personal Holding Companies", of the 1936 Act into amended or new Sections 351 to 356. Section 356(b) is the relevant section, and in turn through the 1938 Act, § 406(b), was carried into the Code as § 505(b). The starting point is therefore the Act of 1937. (Generally, see Paul, *The Background of the Revenue Act of 1937*, 5 Univ. of Chicago Law Rev. 41.)

The report of the joint committee on Tax Evasion and Avoidance (75th Cong., 1st sess., House Doc. No. 337), opens on the first page with a reprint of the President's Message of June 1, 1937, to the Congress. The message embodied the whole of a letter of May 29, 1937, to the President from the Secretary of the Treasury. *Inter alia* the Secretary said:

> "I herewith enumerate some of the principal devices now being employed by taxpayers with large incomes for the purpose of defeating the income taxes which would normally be payable by them."

From page 3 of the report of the joint committee we quote the fourth in the Secretary's enumeration:

> "4. The Device of Incorporating Yachts and Country Estates
>
> Many wealthy taxpayers today are dodging the express provisions of the law denying **deductions for personal expenses** by incorporating their yachts or

their country estates, turning over to the yacht or to the estate securities yielding an income just sufficient to pay the entire expenses of operation. Hundreds of thousands of dollars in income taxes are annually avoided in this way.

Thus, one man's yacht is owned by his personal holding company, along with $3,000,000 in securities. He rents the yacht from his company for a sum far less than the cost of upkeep, and the company uses its income from the securities to pay the wages of the captain and crew, the expenses of operating the yacht, and an annual depreciation allowance. None of these items would be deductible **if this individual owned the yacht personally.**

A great many wealthy taxpayers are utilizing a similar arrangement for the operation of their country places and town houses.

One man has placed his $5,000,000 city residence in such a corporation; another his racing stable whose losses last year were nearly $200,000. The tax savings he thus sought to obtain through the use of the holding company were $140,000.

One wealthy woman has improved on the general plan of evasion by causing her personal holding company, which owns her country place to employ her husband at a salary to manage it. She can thereby supply him with pocket money, and in effect claims a tax deduction for the expense of maintaining him."

By joint resolution of June 11, 1937, a joint committee on tax evasion and avoidance was created and the joint committee began public hearings on June 17, 1937. (report page 6.) *Inter alia* the committee reported (page 12):

"Increased use is being made of the devices of incorporating yachts, city residences, country estates, etc., in order to avoid taxation of income at the rates prescribed in the higher individual surtax brackets or to obtain the benefit of deducting as corporation expenditures **items not allowed to individuals**, or both. The cases presented to the committee indicate that the plan in general consists of the transfer of the yacht or other real estate to a corporation for stock, or as paid-in surplus, or the yacht or real estate is purchased with cash provided by the stockholders. Securities, producing sufficient income to absorb corporate expenditures, are then turned over to the corporation for stock or as paid-in surplus. To lend color to the alleged business activity and to bring the corporation's gross income outside of the provisions of section 351 of the existing law, the corporation charges its principal stockholder some rent for the use of the yacht or real estate. The rent paid is usually much below the cost of the operation of the property and much below the amount which would be charged in an arm's length transaction. Since all expenses and losses of the corporation are claimed as deductions in computing the income of the corporation, a large part of the investment income is absorbed by expenses and losses incurred in the operation of the yacht or the real property. Since rents are not now included for the purpose of determining whether or not a corporation is a personal holding company, the taxpayer may also fix the amount of the rent for the yacht or real estate in an amount sufficient to bring his other investment income below the 80-percent test required under section 351 of existing law.

The committee finds no justification for permitting such tax advantage to these self-incorporated individuals. It is, therefore, suggested that the definition of personal holding company be so framed as to include in the 80-percent test the full amount received as rent or other compensation for the use of property by a corporation from any individual (whether a shareholder or not), who, together with his family and partners owns (directly or indirectly) 25 percent or more in the value of the securities which constitute 'outstanding stock'.

The committee also recommends that there should be disallowed as a deduction from gross income, the expenses of operation and maintenance (including depreciation) of property owned or operated by a personal holding company to the extent that expenses exceed the rent or other compensation for the use of such property, unless it is established to the satisfaction of the Commissioner—

(A) That the rent or other property received is the highest obtainable;

(B) That the property was held in the course of business carried on bona fide for profit; and

(C) That there was reasonable expectation that the operation of the property would result in a profit, or that such property was necessary to the conduct of the business.

To prevent a personal holding company from charging expenses in excess of its income for the operation and maintenance of property, such as yachts, city residences and country estates, etc., against its investment income, such expenses should be disallowed unless the corporation can meet the conditions outlined

above, This has the effect of **placing the personal holding company on the same basis, in this respect, as an individual who cannot offset his personal expenses against his income.** If the corporation establishes to the satisfaction of the commissioner that the second test is satisfied and that the property was necessary to the conduct of such business, it will not be necessary to prove there was reasonable expectation that the operation of the property would result in a profit, in order to obtain a full deduction.

This provision would not apply to a farm or a racing stable operated by the corporation itself where more than 20 percent of the gross income of such corporation came from such operations. This is because the corporation must first be a personal holding company before this provision will apply. Moreover, even if such a corporation is a personal holding company because more than 80 percent of its income comes from investment sources, it will still have the opportunity of escaping this provision by establishing that the property was held in the course of a bona fide business carried on for profit and that such property was necessary for the conduct of the business. Even where an investment corporation is running a yacht, city residence, or country estate on the side, it is, nevertheless, recognized that certain property may be necessary for the conduct of its investment business, such as typewriters, office furniture, automobiles, and the like. Expenses attributable to such property would satisfy the third test.''

That portion of the report is grounded in large part on the statements at the hearings (Hearings, pages 225 and 226) of a designated spokesman of the Treasury (Mr.

Arthur H. Kent, assistant general counsel, Treasury Department), i. e.:

> "The plan of reduction of tax by the corporate device is very simple for an individual of large means. All that is necessary is that he form a corporation, the articles of incorporation of which are made sufficiently broad to permit it, in addition to investing in securities, to own and operate real estate, and to own and operate, lease or rent yachts or other property which he uses for personal enjoyment. The yacht or the real property or both are thus conveyed to the corporation in exchange for its stock or as paid-in surplus, or are purchased by the corporation with cash previously advanced by the stockholder. Income-producing securities are then turned over to the corporation (usually a domestic one) for stock or as paid-in surplus so as to provide it with a substantial income with which to defray alleged operating expenses. In most instances possibly in order to lend some color to its alleged business activities, the corporation will charge its sole or principal stockholder charter fees for the use of the yacht or rent for occupying the residence or other estate. Such charges for fees or rents are typically far below the actual costs of the operation and maintenance or depreciation of the property, and usually much below the amount which would have to be charged in an arm's length transaction to yield a fair return upon the value of the property regarded as an investment.
>
> The corporation claims to be carrying on a business as permitted by its articles of incorporation and defends its claim to a deduction of the expenses on the ground that section 23(a) of the Revenue Act of 1936 and the corresponding provision of prior acts

permits a deduction for all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

It has been very generally assumed that the business of a corporation comprehends all its actual activities which it is empowered by its charter to carry on and which are therein declared to be the objects of its incorporation. In the cases of a great majority of corporations formed bona fide to carry on commercial enterprises for profit, this assumption no doubt accords with the realities. It is difficult to believe, however, that the Congress ever contemplated or expected that the device of incorporation would be abused by individuals in order to obtain tax-saving deductions for **expenditures which would be disallowable, if claimed by them as individuals, under the clear language of section 24 (a) (1), which provides that 'no deduction shall in any case be allowed in respect of (1) personal, living, or family expenses.'**

The investigation so far made, which is far from complete, indicates that this device of creating corporations for the purposes of holding, maintaining, and operating yachts, city mansions, country estates, and racing stables in such manner as possibly to nullify the effect of the express provisions of the statute, which deny or limit the deduction of personal expenses, is now being employed by many wealthy taxpayers and that there is a tendency toward increased use of it. The potential menace to the integrity of the revenues which it contains is very great for it is capable of profitable use by any taxpayer who owns property requiring large personal expenditures and who also owns a substantial amount of income-producing property."

At this point in his testimony Mr. Kent presented the following detailed statement with respect to Mr. Alfred P. Sloan's yacht *Rene* (incorporated as Rene Corporation) and Mrs. Emily R. Cadwalader's yacht *Savarona* (incorporated as Savarona Ship Corporation). *Yacht Rene* (page 227):

Year	Revenue from charter hire	Yacht expenses exclusive of taxes and interest	Loss on Operation
1931	$108,000.00	$161,514.20	$53,514.20
1932	108,000.00	104,349.21	3,650.79
1933	None	34,423.45	34,423.45
1934	90,113.73	151,216.69	61,102.96
1935	116,986.89	134,009.93	67,023.04
1936	119,608.78	185.670.32	36,061.54
Total	$542,709.40	$821,183.80	$278,474.40

Yacht Savarona (page 232):

Year	Revenue from charter hire	Expense of operating yacht	Loss on Operation
1931	$ 75,000.00	$ 145,346.36	$ 70,346.36
1932	137,922.35	152,408.15	14,485.80
1933	28,613.47	208,585.03	179,971.56
1934	.....	168,891.33	168,891.33
1935	.....	170,784.51	170,784.51
1936	.....	191,007.03	191,007.03
Total	$241,535.82	$1,037,022.41	$795,486.59

Appendix B

Legislative history of non-trade or non-business deductions.

The committee reports, Act of 1942 (C. B. 1942-2: House, page 372, at 429-430; Senate, page 504, at 570-571) say:

"Section 118. NON-TRADE OR NON-BUSINESS DEDUCTIONS.

This amendment allows a deduction for the ordinary and necessary expenses of an individual paid or incurred during the taxable year for the production and collection of income, or for the management, conservation, or maintenance of property held by the taxpayer for the production of income, whether or not such expenses are paid or incurred in carrying on a trade or business, and also allows a deduction for the exhaustion and wear and tear (including a reasonable amount for obsolescence) on property held for the production of income, whether or not such property is used by the taxpayer in a trade or business.

For an expense to be deductible under this section, it must have been incurred either (1) for the production or collection of income, or (2) for the management, conservation, or maintenance of property held for the production of income. Ordinary and necessary expenses so paid or incurred are deductible under section 23(a) (2) even though they are not paid or incurred for the production for collection of income of the taxable year or for the management, conservation or maintenance of property held for the production of such income. **The term 'income' for this purpose comprehends not merely income for the**

taxable years but also income which the taxpayer has realized in a prior taxable year or may realize in subsequent taxable years, and is not confined to recurring income but applies as well to gain from the disposition of property. Expenses incurred in managing or conserving property held for investment may be deductible under this provision **even though there is no likelihood that the property will be sold at a profit or will otherwise be productive of income.** The expenses, however, or carrying on a transaction which does not constitute a trade or business of the taxpayer and is not carried on for the production of income or for the management, conservation, or maintenance of property, but which is carried on primarily as **a sport, hobby, or recreation** are not allowable as nontrade or nonbusiness expenses.

Expenses, to be deductible under section 23(a) (2), must be ordinary and necessary, which rule presupposes that they must be reasonable in amount[1] and must bear a reasonable and proximate relation to the production or collection of income, or to the management, conservation, or maintenance of property held for that purpose. * * *

Subsection (d) of this section amends section 23 (l) of the Internal Revenue Code so as to allow, in addition to the deduction allowable under the existing law, a deduction for the **exhaustion, wear and tear of property** held by the taxpayer for the production of income, whether or not the property in question is **used in the trade or business of the taxpayer,** including a reasonable allowance for obsolescence. Except for this, the new allowance is subject to the

[1]At bar they were allowed by the Commissioner for purposes of ordinary income tax.

same limitations and restrictions which have been applicable under this section prior to the present amendment.

The amendments made to the Internal Revenue Code by this section are applicable to all taxable years beginning after December 31, 1938. These amendments shall also be effective as if they were a part of the Revenue Act of 1938 or any prior Revenue Act on the date of its enactment."

Patterned on those reports, Reg. 111, § 29.23(a)-15[2] says:

"* * * The term 'income' ['held for the production of income'] for the purpose of section 23(a) (2) comprehends not merely income for the taxable year but also income which the taxpayer has realized in a prior taxable year or may realize in subsequent taxable years; and is not confined to recurring income but applies as well to gains from the disposition of property. * * * Expenses incurred in managing, conserving, or maintaining property held for investment may be deductible under this provision **even though the property is not currently productive and there is no likelihood that the property will be sold at a profit or will otherwise be productive of income and even though the property is held merely to minimize a loss with respect thereto.** The expenses, however, of carrying on transactions, which do not constitute a trade or business of the taxpayer and are not carried on for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income, but which are carried on primarily as a **sport, hobby, or recreation** are not allowable as nontrade and nonbusiness expenses. * * *"

[2]Extended by the first sentence of § 29.23(1)-1 to depreciation deductions.